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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1095

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

v.

P. L. MILLER, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FREDERIC D. McKENNEY,
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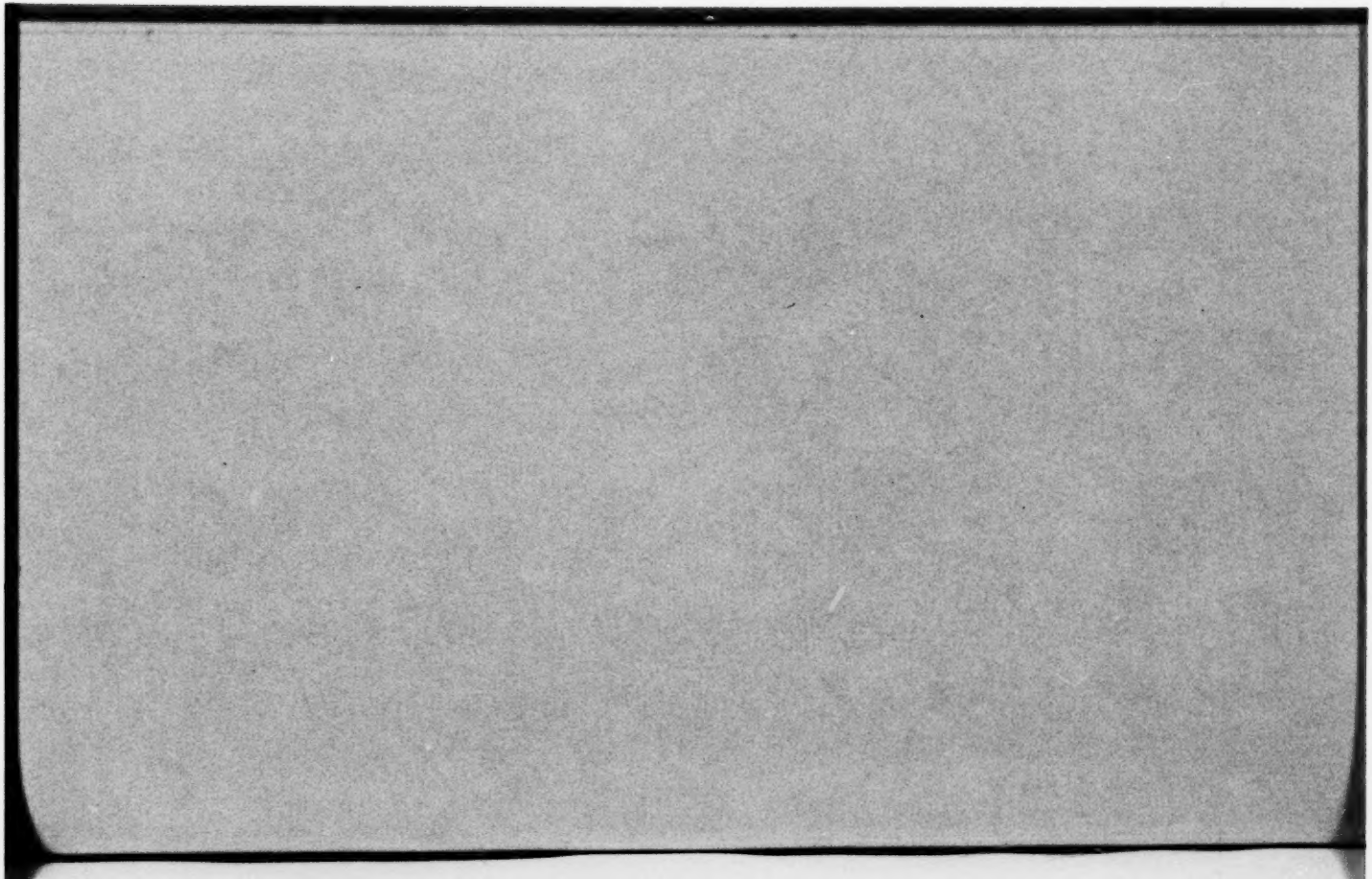

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P. L. MILLER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Pennsylvania Railroad Company respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to review the final judgment entered in the above cause on December 12, 1941, petition for rehearing having been denied on January 2, 1942. (R. 39, 45)

SUMMARY STATEMENT.

Petitioner, a common carrier by railroad, brought its action in the District Court of the United States for the Eastern District of Texas, Sherman Division, to recover from respondent (the consignor-defendant below) its lawful

freight charges for the transportation in June, 1935, of three consignments of onions from points of origin in the State of Texas to Pittsburgh, Pennsylvania. (R. 3-6) The shipments were refused at destination, and upon order of the consignor (respondent) the ladings were sold by the carrier, producing $485.07 less than the accrued transportation charges. (R. 5, 6, 15) Suit was instituted June 10, 1938, to recover such balance of charges. (R. 3)

Respondent alleged, as an affirmative defense, that the ladings had been damaged in transit due to carrier's negligence, in an amount in excess of the unpaid charges claimed and that petitioner, therefore, was not entitled to recover. (R. 9-10, 14)

The bills of lading contained the following pertinent condition:

> "Sec. 2(b). *As a condition precedent to recovery,* claims must be filed in writing * * *; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, *no carrier hereunder shall be liable, and such claims will not be paid.*" (Italics supplied) (R. 8)

Claims for damage to the ladings were duly filed by respondent and written notices of their disallowance were given by petitioner, but no other or further action was had in respect of said claims until they were asserted by way of affirmative defense to petitioner's instant suit for the unpaid transportation charges,—more than two years and one day after the claims had been disallowed in writing. (R. 14)

The trial in the District Court resulted in a verdict of the jury (1) in favor of petitioner for the balance of its transportation charges as claimed and (2) for respondent

in an identical amount as and for damages to the ladings. Judgment on said verdict was entered September 21, 1940, (R. 25-26) and a motion for new trial was overruled November 28, 1940. (R. 26-27) Appeal was taken by petitioner to the United States Circuit Court of Appeals for the Fifth Circuit and on hearing judgment of the District Court was affirmed by a divided court; Holmes, Cir. J., delivering the opinion for the majority, with Hutcheson, Cir. J., dissenting. (R. 33-38; 124 F. (2d) 160)

QUESTION PRESENTED.

Whether a shipper's claim for damage to an interstate shipment, liability for which has been *extinguished* by operation of the provisions of the uniform bill of lading, nevertheless may be revived, and asserted by way of recoupment or otherwise to defeat the carrier's claim for its transportation charges on such shipment?

REASONS FOR ALLOWANCE OF WRIT.

1. This case raises an important question of Federal law covering interstate commerce, affecting shippers and carriers throughout the country, and the application and interpretation of provisions of the uniform bill of lading, approved by the Interstate Commerce Commission.

2. The decision of the majority of the Circuit Court of Appeals is in conflict with many decisions of this court, particularly in that:

(a) It fails to give effect to the provisions of the uniform bill of lading concerning the time limit for the institution of suits on damage claims, contrary to *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Co.*, 241 U. S. 190, and *Texas & Pac. Ry. Co.* v. *Leatherwood*, 250 U. S. 478, which hold that the terms of the bill of lading cannot be waived voluntarily, or by estoppel or otherwise.

(b) It fails to give effect to the provisions of the uniform bill of lading which state that when suits on damage claims are not instituted within the time limit therein provided "no carrier * * * shall be liable, and such claims will not be paid," contrary to *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, and *Chesapeake & O. Ry. Co.* v. *Martin*, 283 U. S. 209, which hold that limitations such as this destroy not only the remedy but the liability as well.

(c) It fails to hold, contrary to *Chicago & N. W. Ry. Co.* v. *Lindell*, 281 U. S. 14, that while the carrier's claim for transportation charges and the shipper's claim for damages may be adjudicated in one suit, they nevertheless must be treated independently.

3. The opinion of the majority of the Circuit Court of Appeals permits preferences and discriminations among shippers prohibited by the Interstate Commerce Act, in that the limitation provisions with respect to shippers' suits for damages may be waived in certain instances and enforced in others, and a uniform rule of liability throughout the country will be replaced by conflicting applications of the rule of recoupment as defined by statute and judicial construction in the several states.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

THE PENNSYLVANIA RAILROAD COMPANY,
By FREDERIC D. MCKENNEY,
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